IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/08/2002

CORAM

THE HON'BLE MR. JUSTICE K. SAMPATH

S.A.No.1285 of 1992

A. Murugesan,
S/o Angamuthu Gounder,
Karaiyanur,
Kannandheri P.O.,
Sankari Taluk,
Salem District. ... Appellant

-Vs-

1. Angamuthu Gounder,
S/o Chinna Gounder.

2. Manickam,
S/o Angamuthu Gounder.

3. Palanisami,
S/o Angamuthu Gounder.
(All reside at Karaiyanur,
Kannandheri P.O.,
Sankari Taluk,
Salem District. ... Respondents

For Appellant: ... Mr.T. Murugamanickam

For Respondents: ... Mr.M. Sathyanarayanan

This second appeal is filed against the judgment and decree dated 1 9-4-1989 made in A.S.No.165/89 on the file of the learned First Additional District Judge, Salem.

:JUDGMENT
The plaintiff in O.S.No.505/85 on the file of the learned Subordinate Judge, Sangagiri, is the appellant in the second appeal. He filed the suit for partition and separate possession of his one half share in the suit properties. The defendants were his father Angamuthu and his sons through one Chinnathayee.

2. His case as set out in the plaint is as follows:

The suit properties fell to the share of the first defendant in a partition dated 17-4-1973. The first defendant married the plaintiff's mother one Thailammal in 1935 as per custom in the community. The plaintiff and one Thankamma were born to them. Out of the income from the joint family properties, the first defendant constructed houses, dug up wells and purchased properties. The plaintiff was entitled to one half share in the suit properties. There were no debts to the family. The first defendant had an elder brother by name Sengoda Gounder. He died leaving behind two wives, Thaiyamuthammal and Chinnathayee. The first defendant was keeping Chinnathayee as his concubine. Defendants 2 and 3 and three female children were born to them. There was misunderstanding between the plaintiff and the first defendant because of defendants 2 and 3. The plaintiff caused a notice to be issued on7-2-1985 for partition. The first defendant sent a reply stating that the plaintiff was only his second wife's son and defendants 2 and 3 were his sons through his first wife Chinnathayee and they were also entitled to a share. The suit was therefore necessitated.

3. The first defendant filed a written statement contending inter alia as follows:
He married the plaintiff's mother Thailammal in 1937; she was his second wife and Chinnathayee was his first wife and mother of defendants 2 and 3; six months prior to his marrying Thailammal, the first defendant married Chinnathayee, widow of his elder brother Sengoda Gounder, who died in March, 1936; the first defendant belonged to Vanniyakula Kshatriya and he married Chinnathayee as per custom in the Community; it is not correct to say that Chinnathayee was his concubine; there is a custom in the Community for remarriage of widows; defendants 2 and 3 are legitimate children and they are entitled to a share; the first defendant purchased house and other properties on 24-11-1943 ; they were his separate properties; a division was effected in 1940 originally, though the partition deed was executed only in 1973; In that partition, the first defendant gave away his self-earned properties to his brother's children and took their property in S.No.94, which was subdivided as S.Nos.94/1 and 94/1-A; he dug a well in the property and put up a house in 1961; the thatched house was put up in 1943 and tiled house in 1969 out of his own earnings; there is debt of Rs.10,000/-; It is not correct to say that till date there had been no division; there was an oral division on 4-6-1971; the properties were divided into four equal shares; the movables were also divided and ever since the division the respective sharers were in separate possession; the oral division was effected in the presence of panchayathars; in 1978 misunderstanding arose between the plaintiff and the first defendant; the plaintiff gave a criminal complaint against the first defendant; it is not correct to say that the plaintiff is in enjoyment of the joint family properties; the plaintiff is enjoying the properties allotted to him separately; in case, a fresh division is to be effected, the self-earned properties of the first defendant may be left out and there can be a partition of the other properties and provisions should be made for repayment of the debt in a sum of Rs.10,000 /-.

4. Defendants 2 and 3 supported the case of the first defendant and contended that they were legitimate children of the first defendant; they were entitled to 1/4th share; even assuming that they were not

legitimate children of the first defendant, they were entitled to 1/4 th share; in any event, they had been in long possession and enjoyment from 1971 and there was an oral partition and they had prescribed for title by adverse possession.

5. On the above pleadings, the learned Subordinate Judge framed the necessary issues and on the oral and the documentary evidence, held that defendants 2 and 3 were the legitimate children of the first defendant, that there was no oral partition as contended by the defendants in 1971 and that the plaintiff was entitled to partition and separate possession of his 1/4th share. So holding by judgment and decree dated 30-9-1988, the learned Subordinate Judge passed a preliminary decree for partition.

6. In so far as the plaintiff had been granted only a 1/4th share in the properties, he filed an appeal in A.S.No.165/88 before the Additional District Judge, Salem, who by his judgment and decree dated 19 -4-1989, confirmed the decision of the trial Court and dismissed the appeal.
7. It is as against that, the present second appeal has been filed. At the time of admission, the following substantial question of law was framed for decision in the second appeal:
"Whether the Court below was right in law in stating that a presumption of a valid marriage must be drawn between the first defendant and Chinnathayee?

8. Mr. Murugamanickam, learned Counsel for the appellant, submitted that there were vital discrepancies in the evidence of the first defendant, that if we go by his evidence, it would be clear that Chinnathayee could not have married the first defendant prior to his marriage with Thailammal, that the Courts below were in error in presuming a valid marriage overlooking the following material circumstances:

(1) Chinnathayee herself was already married to the first defendant's brother Sengoda Gounder and it is most unlikely that the first defendant married the widow first and married the mother of the plaintiff thereafter.
(2) There is no independent evidence with regard to the marriage of Chinnathayee, a widow with a male issue.

(3) Non-examination of Chinnathayee to prove the marriage is a strong piece of evidence against the probability of a valid marriage.

9. The Courts below, in the submission of the learned Counsel, were in error in not deciding the question as to whether the plaintiff's mother was married first or the alleged marriage with Chinnathayee took place first.

10. Further, according to the learned Counsel, it could be seen that the second defendant was born within four months of the alleged marriage with chinnathayee. The learned Counsel for the appellant relied on the following decisions in support of his contentions:

1. SEERANGAMMAL (DIED) AND OTHERS VS. E.B. VENKATASUBRAMANIAN & OTHERS (100 L.W. 58)

2. K. MUNUSWAMI GOUNDER AND ANOTHER VS. M. GOVINDARAJU AND 4 OTHERS (1995-I L.W. 487.

11. As regards the powers of this Court to interfere under Section 100 of the Code of Civil Procedure, the learned Counsel relied on the following decisions:

1. MAJOR SINGH VS. RATTAN SINGH (DEAD) BY L.RS. AND OTHERS (1997(3) SCC 546)

2. V. MANAKKAN AND FIVE OTHERS VS. VEERA PERUMAL (1998-2 CTC 157)

3. RAJIAH NADAR VS. MANONMANI AMMAL (1999-1 CTC 245) and

4. KRISHNAN AND OTHERS VS. SUBHASHINI AND OTHERS (2000-3 MLJ 629).

The learned Counsel lastly submitted that in any event, there should be a remand for consideration afresh as to whether the first defendant married Chinnathayee first or Thailammal first.

12. Per contra, Mr.M. Sathyanarayanan, learned Counsel for the respondents, submitted that the Courts below have as a question of fact come to a conclusion that there was a valid marriage between the first defendant and Chinnathayee and that defendants 2 and 3 were born to them and that Thailammal married the first defendant only after his marriage with Chinnathayee. This being a question of fact, absolutely no interference is called for.

13. According to the learned Counsel Mr. Murugamanickam, the trial Court merely sets out the evidence of P.W.3. It does not accept or reject his evidence. The evidence of P.W.2 is not considered at all. The learned Counsel in this connection only, relied on the decision in K. MUNUSWAMI GOUNDER AND ANOTHER VS. M. GOVINDARAJU AND 4 OTHERS (1995-1 LW 487) and submitted that once a perso n sets up a marriage and is not able to prove the factum of the marriage, he cannot rely upon presumption on the basis of long cohabitation.

14. The case of the first defendant is that he married Chinnathayee prior to his marrying Thailammal. The custom in the Community that there could be widow remarriage is not disputed. It is also not in dispute that the alleged marriages of the first defendant took place prior to the introduction of the Bigamy Prohibition Act, 1949.

15. Let us now have a look at the oral evidence. P.W.1 is the plaintiff and his evidence in this regard is practically useless. He is not a competent witness to speak about the marriage of his father. P.W.2 is Thailammal. In her chief examination, she has stated that the first defendant is her maternal uncle, that at the time of her marriage, his brother Sengoda

Gounder was alive, that he died only after her marriage, that he had a son through Chinnathayee, that all of them lived together after the death of Sengoda Gounder, that at that time Chinnathayee was pregnant through the first defendant, that there was no marriage between the first defendant and Chinnathayee, that he started keeping her, that she was upset and went away to her father's house, that she returned to the marital home one and a half years thereafter after a panchayat and that there was no division between the first defendant and the plaintiff. In the cross examination, she has admitted about the custom prevailing in the Community regarding the widows remarriage, that the custom was in vogue for a long time, that her brothers-in-law had each two wives, that it was not correct to say that Sengoda Gounder died prior to her marriage, that the first defendant, Chinnathayee and herself lived jointly in the same house, that she could not say when Sengoda Gounder died, that she was married to the first defendant in 1935 and that it was not correct to say that she was the second wife, but she was the first wife.

16. P.W.3 is one Naina Gounder aged 80 years in 1988. In his chief examination, he stated that Sengoda Gounder died one year after the marriage between the first defendant and Thailammal, that after the death of Sengoda Gounder, the first defendant, Sengoda Gounder's wife and others were living together, that Thailammal was upset over Chinnathayee living with the first defendant and being pregnant 5 or 6 months and therefore she went away to her mother's place, that there was a panchayat and the first defendant told him that he had not married Chinnathayee and that only he was keeping her. In crossexamination, he stated that the plaintiff was known to him, that he did not remember the panchayat date and he could not give the date, that it was not correct to say that there was no panchayat. He admitted that the first defendant was living with both his wives as a single family.

17. The first defendant has examined himself as D.W.1. He has stated in his chief examination that he was married in 1937 to Chinnathayee and thereafter married P.W.2 Thailammal, that he married the widow of his brother Sengoda Gounder as per family custom, that he was living with his two wives as a single family, that defendants 2 and 3 were his children through his first wife Chinnathayee and the plaintiff was his only son through his second wife Thailammal, that it was not correct to say that he did not marry Chinnathayee and that Thailammal was his first wife and that one year after his marriage with P.W.2, he took Chinnathayee as his concubine. In cross-examination, he stated that his brother died on 20th of Masi, that he had no connection with his brother's wife while he was alive, that one year after his brother's death, he married Chinnathayee and it was in Aani and he married P.W.2 in Aippasi, that P.W.2 did not quarrel with him because he married Chinnathayee nor did she go away to her mother's place and that at the time of his marriage to P.W.2, he had a son through Chinnathayee.

18. D.W.2 is one Manickam. It is not necessary to refer to his evidence. One Pachiannan has been examined as D.W.3. He has said about the marriage of D.W.1 with Chinnathayee, that he attended the marriage, that six months thereafter, the first defendant married P.W.2 and that at the time of the first defendant's marriage with Chinnathayee, he was 21 years old. His evidence, according to the learned Counsel Mr. Murugamanickam, cannot be

accepted as he would have been very young at the time of the alleged marriage between Chinnathayee and the first defendant. I do not think that such a contention can be accepted. The memory of a person can be pretty good even if several years have passed by. It is very likely that one may not remember what happened yesterday, but, is able to recollect something that happened 30 years or 40 years back.

19. Whatever it is, the Courts below chose to accept the marriage between the first defendant and Chinnathayee as having taken place prior to the first defendant's marriage with Thailammal, mother of the plaintiff. The marriage between the first defendant and Chinnathayee, in my view, has been satisfactorily established and that the Courts below have proceeded on probabilities, particularly when evidence as regards the exact date and time of marriage wo uld not be available at this distance of time, having not merely relied on presumption arising out of long cohabitation. Even otherwise, on the evidence I am satisfied that it has been established that the first defendant married Chinnathayee before he married Thailammal.

20. I will now refer to the various decisions relied on by the learned Counsel for the appellant.

21. In SEERANGAMMAL (DIED) AND OTHERS VS. E.B. VENKATASUBRAMANIAN & OTHERS (100 LW 58) a Division Bench of this Court held that,

"presumption of marriage from long cohabitation and evidence from materials like school records, letters, voters' list, money order coupons, etc. would be sufficient to show that a woman was treated by a man as his wife."

In that case, the description of the lady in the Will as "vaippu manaivi" was held not to mean a concubine in view of the fact that in several documents she had been described as wife. In that case, the recognition of her as wife by the husband himself, even though origin was in the nature of concubinage and long cohabitation with her, after the death of the first wife and on the materials to show that society treated her as his wife, the Bench held that those things would be sufficient to draw the presumption under Section 114 of the Evidence Act. In paragraph 24 this is what the Bench stated:

"Yet another plea of defendants is that marriage ceremony as claimed in para 12 of the plaint having not been established, the presumption under Section 114 of the Evidence Act cannot exist. Failure to establish by legal evidence about ceremonies was due to the fact that they took place inside the family house and in the presence of selected relatives and well wishes of Ranganatha. To prevent publicity and with an obvious aim of preventing prestige, secrecy had been maintained. No invitations were printed. Under such circumstances, her inability to prove the marriage and more so when Ranganatha's relations who could alone speak about it are antagonistic and aim at getting at the property; this failure to sustain a form of marriage attempted by her would not act as a bar against her from invoking Section 114 of the Evidence Act. This is neither a conflicting nor an alternative plea put forth, but one mode of proof adduced but not established due to special circumstances obtaining

when such acts are committed by men aimed at benefitting themselves. Factum of continued cohabitation as husband and wife to the knowledge of the world thus made out, the failure to prove marriage would not stand in the way of presumption being drawn."
22. In K. MUNUSWAMI GOUNDER AND ANOTHER VS. M. GOVINDARAJU AND 4 OTHERS (1995-1 LW 487) it has been held that presumption of marriage under Section 114 of the Evidence Act cannot be drawn when facts show that no marriage could have taken place between the man and the woman by rebuttal evidence.

23. The learned Counsel for the appellant submitted that once a person comes forward with a case of marriage and fails to prove it, then he cannot fall back on the presumption under the Evidence Act. This is not a case where any presumption is sought to be drawn. In fact, there is an admission on the side of the plaintiff that Chinnathayee was the wife, but she was only the second wife. When there was no prohibition for a second marriage and when there was also a custom in the Community for marrying a brother's widow and when P.W.3 in cross examination has stated that the first defendant was living with his two wives as a single family and this coupled with the evidence of D.W.1 that he married Chinnathayee first and thereafter Thailammal would conclusively show that there was indeed a marriage between the first defendant and Chinnathayee.

24. In BADRI PRASAD VS. DEPUTY DIRECTOR OF CONSOLIDATION AND OTHERS (1978-3 SCC 527) a three Judges of the Supreme Court held that from a man and a woman living together for 50 years a strong presumption of marriage between them arises under Sections 114 and 101 to 103 of the Evidence Act and the burden was very heavy on anyone seeking to rebut such presumption. It was also held that if men and women who live as husband and wife in society are compelled to prove, half a century later,by eyewitness evidence that they were validly married, a few will succeed.

25. In SURJIT KAUR VS. GARJA SINGH AND OTHERS (AIR 1994 SC 135 = 19 94-1 LW 38) the Supreme court held that in the absence of proof, pleading of customary marriage and living together as husband and wife by itself, would not confer the status of husband and wife. In that case, the wife was in the habit of changing husbands frequently. Merely because they lived as husband and wife, the Supreme Court held that the status of wife was not conferred on the person claiming to have married.

26. The instant case is one where the custom is accepted and the marriage also is accepted, though P.W.2 claims that she is the first defendant's first wife. She has admitted the custom regarding marriage between the man and his brother's widow and the man having more than one wife at a time.

27. Having regard to the state of evidence, I have no hesitation in concurring with the view taken by the Courts below and confirming the decree for 1/4th share in favour of the plaintiff and

dismissing his appeal claiming more share. No interference is called for. The substantial question of law is answered against the appellant. The second appeal fails and the same is dismissed. However, there will be no order as to costs.

Index: Yes
Internet: Yes

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To

1. The First Additional
District Judge, Salem,
(with records)

2. The Subordinate Judge,
Sangagiri.

3. The Record Keeper,
V.R. Section,
High Court,
Madras.

K. SAMPATH, J.
Judgment in S.A.No.1285 of 1992